Supreme Court, U.S.
FILED

No. 97 1826 MAY 11 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

ISABEL BIDDLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

SCOTT J. SCHNEIDER
Counsel of Record
DRAZIN and WARSHAW, P.C.
Attorneys for Petitioner
25 Reckless Place
Red Bank, New Jersey 07701
(732) 747-3730

146333

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

26 pp

QUESTION PRESENTED FOR REVIEW

Should this Court reinstate the petitioner's complaint which was improperly dismissed under Federal Rule of Civil Procedure 4(m)?

PARTIES TO THE PROCEEDING

Petitioner is a resident and citizen of Portsmith, Virginia.

Respondent is the Federal Government.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Rule Involved	1
Statement of the Case	2
Reason for Granting the Writ	5
I. Certiorari Should Be Granted To Rectify A Ruling By The United States Court Of Appeals For The Third Circuit Affirming The District Court's *Sua Sponte* Order Of Dismissal And Denial Of Plaintiff's Motion To Vacate The Dismissal.	5
Conclusion	8

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Forest v. United States, 539 F. Supp. 171 (D. Mont. 1982) 6

McKenith v. United States, 771 F. Supp. 670 (D. N.J. 1991) 6

Pascale v. United States, 998 F.2d 186 (3d Cir. 1993) 6, 7

Zankel v. United States, 921 F.2d 432 (2d Cir. 1990) 6, 7

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2401(b) 7

28 U.S.C. § 2675(a) 7

Rule Cited:

Federal Rule of Civil Procedure 4(m) ..... i, 1, 5, 6, 7

Contents

Page

APPENDIX

Appendix A — Memorandum Opinion Of The United States Court Of Appeals For The Third Circuit Filed February 10, 1998 ..... 1a

Appendix B — Order Of The United States Court Of Appeals For The Third Circuit Dated February 10, 1998 ..... 4a

Appendix C — Order Of The United States District Court For The District Of New Jersey Filed May 21, 1997 ..... 6a

Appendix D — Memorandum Opinion Of The United States District Court For The District Of New Jersey Filed May 21, 1997 ..... 7a

OPINIONS BELOW

On February 10, 1998, the United States Court of Appeals for the Third Circuit issued its opinion affirming the decision of the District Court granting a *sua sponte* dismissal and denying petitioner's motion to vacate the dismissal.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Third Circuit and its judgment of February 10, 1998.

Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 4(m) provides:

> *(m) Time Limit for Service.* If service of the summons and compliant is not made upon a defendant within 120 days after filing the complaint, the Court, upon motion or its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the Court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j) (1).

STATEMENT OF THE CASE

Petitioner filed a complaint in the United States District Court for the District of New Jersey alleging a personal injury arising from an accident on May 3, 1996, at the premises on Fort Monmouth, New Jersey, a United States Army base. On March 24, 1997, the District Court entered an Order dismissing, *sua sponte*, petitioner's complaint. On March 27, 1997, petitioner served a motion to vacate the dismissal and reinstate the complaint. On May 21, 1997, the District Court filed an opinion and order denying petitioner's motion to vacate the dismissal. Petitioner then appealed to the United States Court of Appeals for the Third Circuit which issued its opinion and judgment on February 10, 1998, affirming the District Court.

A brief synopsis of the undisputed facts and procedural steps are helpful for the appropriate analysis of this case:

March 3, 1996	Petitioner injured in fall at bowling alley at Fort Monmouth. Multiple injuries include a fractured nose.
March 11, 1996	SF95 Claim Form submitted to Fort Monmouth, U.S. Army Claims Service, Ft. Meade, Md. and U.S. Attorney General in Washington, D.C.
April 18, 1996	Letter of Jeffrey Axelrad, Director, Torts Branch, D.O.J. to Col. Moulin with copy to petitioner's counsel. Mr. Axelrad states to Col. Moulin in this letter "Claimant has been advised of the referral and *requested to direct all further communication* regarding the claim *to you.*" (Emphasis supplied.)

September 9, 1996	Six month period under 28 U.S.C. Sec. 2675(a) ends with no communication at all from the Army Claims Service.
September 20, 1996	Complaint in District Court filed.
September 24, 1996	Summons issued.
October 3, 1996	Summons and Complaint mailed to Col. Moulin in accordance with 4/18/96 letter of U.S. Department of Justice (D.O.J.)
October 7, 1996	Summons and Complaint received by U.S. Army Claims Service in Ft. Meade, Maryland
November 5, 1996	Final Administrative Tort Claim denial mailed to petitioner's counsel from Ft. Meade, Maryland.
December 30, 1996	Letter from petitioner's counsel to Col. Moulin inquiring why no Answer had been filed. Mr. D'Arcy McGill of petitioner's counsel's staff called Mr. Axelrad.
January 30, 1997	120 days from filing of complaint. Rule 4(m) F.R. Civ. P.
February 7, 1997	Department of Army letter from Arlington, Virginia requests curative action for service process together with phone call to petitioner's counsel by Army JAG staff.

March 6, 1997	Summons and Complaint served by certified mail upon Attorney General, Washington, D.C. and the U.S. Attorney, Newark, New Jersey.
March 10, 1997	Certified mail with summons and complaint both received by U.S. Attorney and Attorney General on same day.
March 24, 1997	*Sua Sponte* Court Order of Dismissal.
March 27, 1997	Motion to Vacate Dismissal filed.
May 1, 1997	Application of U.S. Attorney for Extension of Time to Answer.
May 5, 1997	Six month statute of limitations expires under 28 U.S.C. Sec. 2401(b)
[SAME DAY] May 5, 1997	Letter Brief of U.S. Attorney in Opposition to Motion to Re-instate placed into mail.

REASON FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RECTIFY A RULING BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING THE DISTRICT COURT'S SUA SPONTE ORDER OF DISMISSAL AND DENIAL OF PLAINTIFF'S MOTION TO VACATE THE DISMISSAL.

In this case, the District Court entered a *sua sponte* order of dismissal under Federal Rule of Civil Procedure 4(m). However, this Rule specifically requires that *before* such action is taken, notice be given to plaintiff. No notice was given as specifically required by the Rule.

The chronology recited above reveals that the District Court, without any notice to any of the parties, entered an order of dismissal of the petitioner's complaint on March 24, 1997. Prior to the date of that Order, petitioner served the summons and complaint upon the U.S. Attorney for New Jersey and the U.S. Attorney General on March 10, 1997, in response to a letter request of the U.S. Army Judge Advocate's office which had handled the administrative tort claim in this case. Upon receipt of the District Court's order of dismissal, petitioner filed a motion to vacate the dismissal instead of filing a separate complaint alleging the same cause of action based upon the same facts alleging a tort claim. On the date that the applicable tort claims statute of limitations expired, the Government mailed its opposition to the motion to vacate the order of dismissal. Under these circumstances, substance should control over form. Petitioner would have filed a separate lawsuit to start this action all over again had her counsel been aware that the Government opposed the motion to reinstate. The petitioner had properly

served the Government before the Court entered its order of dismissal. Thus, the order of dismissal and denial of petitioner's motion to vacate the dismissal should be reversed.

These undisputed facts reveal that there is no prejudice to the Government in this case. Both the agency, the Army, and the Department of Justice knew about the details of the claim and the existence of the suit within days after each was filed. With respect to administrative claims, federal courts have ruled that, in the absence of prejudice and in the presence of extenuating circumstances, the "strict application of Tort Claims Administrative Procedures" can be relaxed. *Forest v. United States*, 539 F. Supp. 171, 173 (D. Mont. 1982).

In this case, within the time provided by the Rules, process was served upon the precise offices to which the Department of Justice directed petitioner's counsel by letter in April, 1996. Prior to the Court's order of dismissal in this case, the service of process was "cured" by effective service upon both the U.S. Attorney and the U.S. Attorney General on March 10, 1997. No discovery had occurred, and the Government had not yet filed an answer. There is no prejudice whatsoever to the Government which, for the first time, sought to raise the 120 day bar of Rule 4(m) on the very day that the statute of limitations expired. Under these circumstances, this suit should be permitted to proceed. *See Zankel v. United States*, 921 F.2d 432, 436-8 (2d Cir. 1990).

Most importantly, the circumstances of the procedure of this case should be interpreted and applied in accordance with *Pascale v. United States*, 998 F.2d 186, 191 (3d Cir. 1993) which criticized *McKenith v. United States*, 771 F. Supp. 670 (D. N.J. 1991) by noting that:

> . . . statutes and rules should be interpreted to provide fair and equitable treatment to claimants.

Zankel permitted a federal tort claims suit to proceed even though the literal application of 28 U.S.C. § 2401(b) and Sec. 2675(a) might appear to have prevented such a suit. In *Zankel, supra* and *Pascal, supra* both circuit appellate courts ruled in favor of the citizen claimant over the Government. The same result should follow here so that Mrs. Biddle's suit is not forever barred.

The *Pascal* case is particularly instructive. There, the plaintiff filed a second suit after the first had been dismissed for non-compliance under Rule 4(m). The second suit was filed more than six months after the first suit, but the agency in that case, the Department of the Treasury took no action on plaintiff Pascal's administrative claim. The Government attempted to argue that the second lawsuit was "time barred." The Court of Appeals reversed the dismissal of the second suit and determined that the principle of "fair and equitable treatment to claimants" should be applied. 998 F.2d at 192. The same result should follow here, especially since there is absolutely no prejudice to the Government whatsoever.

If the rules are to be applied literally and without regard to their impact, then the dismissal of petitioner's complaint should be reversed for the District Court's failure to comply with Rule 4(m) as it did not act with notice as required. The better (and fairer view) is that the Government should not gain a procedural advantage over an ordinary citizen such as petitioner in the federal courts under these circumstances. Only this Court at this stage of the proceedings can create such a just result.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT J. SCHNEIDER
Counsel of Record
DRAZIN and WARSHAW, P.C.
Attorneys for Petitioner
25 Reckless Place
Red Bank, New Jersey 07701
(732) 747-3730

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 10, 1998

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5386

ISABEL BIDDLE,

Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 96-04547)
District Judge: Honorable Garrett E. Brown, Jr.

Submitted under Third Circuit LAR 34.1(a)
February 9, 1998

BEFORE: GREENBERG, NYGAARD, and MCKEE,
Circuit Judges

(Filed: FEB 10 1998)

MEMORANDUM OPINION OF THE COURT

Appendix A

GREENBERG, *Circuit Judge.*

Isabel Biddle appeals from an order entered on May 21, 1997, denying her motion to vacate an order of March 24, 1997, dismissing her complaint pursuant to Fed. R. Civ. P. 4(m) without prejudice for having failed to effect service of the summons and complaint within 120 days of the filing of the complaint. While ordinarily the dismissal of a complaint without prejudice is not an appealable order, in this case it appears that the statute of limitations has run in the case so that it cannot be reinstated. Indeed, appellant concedes as much. Consequently, we have jurisdiction. *See Bhatla v. U.S. Capital Corp.*, 990 F.2d 780, 786 (3d Cir. 1993).

Judge Brown has set forth the background of the case in his opinion and in the circumstances we will not repeat it. Biddle contends that we exercise plenary review on this appeal as it involves the construction and application of Fed. R. Civ. P. 4(i). We disagree as it is clear that an abuse of discretion standard applies. *See Ayres v. Jacobs & Crumplar, P.A.*, 99 F.3d 565, 568 (3d Cir. 1996). In these circumstances we are constrained to affirm. It is quite apparent from the record that appellant's counsel simply did not follow the rather uncomplicated requirements for the service of the summons and complaint here. Furthermore, inasmuch as appellant has not shown good cause for the failure to effectuate service, the absence of prejudice to the United States and the running of the statute of limitations cannot change our result. *See MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097-98 (3d Cir. 1995).

In view of the aforesaid we will affirm the order of May 21, 1997.

Appendix A

TO THE CLERK:

Please file the foregoing memorandum opinion.

s/ Morton J. Greenberg
Circuit Judge

DATED: FEB 10 1998

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 10, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5386

ISABEL BIDDLE,

Appellant

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 96-04547)

BEFORE: GREENBERG, NYGAARD, and MCKEE,
Circuit Judges

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit LAR 34.1(a) on February 9, 1998.

On consideration whereof, it is now here ADJUDGED and ORDERED by this court that the order of the District Court entered May 21, 1997, be and the same is hereby affirmed.

Costs taxed against appellant.

Appendix B

ATTEST: s/ P. Douglas Sisk
Clerk

DATED: FEB 10 1998

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MAY 21, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 96-4547

ISABEL BIDDLE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

For the reasons set forth in this Court's Memorandum Opinion, issued without oral argument pursuant to Fed. R. Civ. P. 78,

IT IS this 20th day of May, 1997

ORDERED that the motion of plaintiff, Isabel Biddle, to vacate this Court's March 24, 1997 Order and reopen plaintiff's complaint be and is hereby DENIED.

s/ Garrett E. Brown
GARRETT E. BROWN, JR., U.S.D.J.

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MAY 21, 1997

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 96-4547

ISABEL BIDDLE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION

BROWN, District Judge

This matter comes before the Court on the motion of plaintiff, Isabel Biddle, to vacate this Court's March 24, 1997 Order dismissing plaintiff's complaint without prejudice for failure to comply with Fed. R. Civ. P. 4(m). For the reasons set forth in this Memorandum Opinion, issued without oral argument pursuant to Fed. R. Civ. P. 78, the Court will deny plaintiff's motion.

Appendix D

I. BACKGROUND

Plaintiff alleges that on or about May 3, 1996, she and several other retired members of the armed forces were invited to bowl at the bowling alley located in Fort Monmouth, New Jersey. *See* Compl. ¶¶ 1-3. Plaintiff further alleges that, due to defendant's negligence, she slipped and fell while entering the bowling alley through a side door. *Id.* ¶ 4. As a result of her fall, according to plaintiff, she sustained a variety of bodily injuries which require present and future medical treatment. *Id.* ¶ 5.

Plaintiff filed an Administrative Claim on March 11, 1996. Subsequently, after the United States failed to deny the claim within the six (6) month period provided for by the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, plaintiff opted to deem the Administrative Claim as denied by the United States and the Department of the Army. Thereafter, on September 20, 1996, plaintiff filed the instant Complaint in this Court.

On September 24, 1996, a Summons was issued for defendant United States. Thereafter, on October 3, 1996, plaintiff mailed the Summons and Complaint to Colonel Francis Moulin, Chief of the Tort Claims Division, U.S. Army Claims Service. On March 10, 1997, this Court issued a Notice of Call for Dismissal pursuant to Fed. R. Civ. P. 4(m) due to plaintiff's failure to effect service of the summons and complaint within 120 days of filing her complaint. Subsequently, on March 24, 1997, after plaintiff failed to establish that service was effected within 120 days — or show good cause for her failure to do so — plaintiff's complaint was dismissed without prejudice pursuant to Rule 4(m). On March 31, 1997, plaintiff filed the instant motion to vacate the March 24th Order and reopen her case.

Appendix D

II. DISCUSSION

A. PLAINTIFF'S MOTION TO VACATE

Service upon the United States of America is governed by Fed. R. Civ. P. 4(i)(1)(A) & (B), which provides as follows:

> (1) Service upon the United States shall be effected
>
> (A) by delivering a copy of the summons and of the complaint to the United States Attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and
>
> (B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia. . . .

Under Rule 4(m), if service of process is not made within 120 days after commencement of the action, the Court "shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time. . . ." Fed. R. Civ. P. 4(m). If, however, "the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period." *Id.* The Court may dismiss the action within

its sound discretion, if plaintiff fails to show good cause. *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1096 (3d Cir. 1995), *cert. denied*, 117 S. Ct. 64 (1997); *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1305-06 (3d Cir. 1995). To establish good cause, a plaintiff must demonstrate good faith and some reasonable basis for noncompliance within the time specified by the rules, but the primary focus at all times is on plaintiff's reason for not complying. *MCI*, 71 F.3d at 1097.

It is, of course, well established that inadvertence of counsel will never constitute the necessary good cause. *Petrucelli*, 46 F.3d at 1307 (citing *Lovelace v. Acme Markets, Inc.*, 820 F.2d 81, 84 (3d Cir.), *cert. denied*, 484 U.S. 965 (1987)). Nor does the running of the statute of limitations, or the absence of prejudice to the defendant by itself provide a basis for concluding that the necessary good cause is present. *MCI*, 71 F.3d at 1097-98; *Petrocelli*, 46 F.3d at 1307 & n.11. Moreover, such service as plaintiff has attempted to date remains wholly ineffective since no effort was made to obtain the Court's leave to effect service out of time. *MCI*, 71 F.3d at 1097 (discussing the need to obtain the court's determination of whether good cause exists for extending time for service, and if not, whether to extend time in any event).

In the present matter, plaintiff has not established good cause for the failure to timely effect service. Federal law clearly specifies when and how to effect service of process on the United States. This is not a situation in which the defendant could be said to have been evading plaintiff's reasonable attempts at service, or in which defendant's location is unknown. Here, plaintiff simply did not attempt any service upon the United States Attorney prior to the running of the 120-day period for

service, and according to the Certification of Counsel, plaintiff only made a token attempt at serving the United States Attorney General in October 1996. In reality, all counsel did was to send the Complaint by mail to the federal agency. *See* Certification of Counsel, Exh. B. This is not even close to the service required under Fed. R. Civ. P. 4(i) and no good basis for non-compliance has been offered. Therefore, the Court's dismissal of plaintiffs complaint without prejudice will stand.

Moreover, this analysis is not changed by plaintiffs reliance on *Zankel v. United States*, 921 F.2d 432 (2d Cir. 1990). In *Zankel*, the court reversed a dismissal where the plaintiff did timely serve the United States Attorney but failed to serve the United States Attorney General. Shortly thereafter, however, the Second Circuit noted the limited scope of the *Zankel* decision and affirmed a dismissal where the plaintiff failed to serve either the United States Attorney or the United States Attorney General, and served only agency counsel. *See Frasca v. United States*, 921 F.2d 450 (2d Cir. 1990). The latter case is far closer to the situation here.

Equally unavailing is plaintiff's suggestion that mailing the Summons and Complaint to Colonel Moulin, the Chief of the Tort Claims Division of the U.S. Army's Claims Service, somehow constitutes effective service. This contention is based on a complete misreading of the plain language found in an April 18, 1996 letter from Jeffrey Axelrad, Director of the Torts Branch of DOJ's Civil Division, to Colonel Moulin ("April 18th Letter"). This letter states as follows:

> The U.S. Department of Justice received the above *administrative tort claim* on March 14, 1996. Because the claim arises out of the actions of the

> U.S. Army, in accordance with 28 C.F.R. § 14.2(b)(1), I am forwarding it to you office for appropriate action.
>
> *Claimant* has been advised of the referral and requested to direct all further communication regarding the *claim* to your office.

See April 18th Letter, attached to Plaintiff's Motion to Vacate as Exh. B (emphasis added). Clearly, the Attorney General's letter did nothing more than instruct plaintiff to send her correspondence to the agency while the case was at the administrative stage. It does not in any way excuse proper service in accordance with the Federal Rules of Civil Procedure once the suit in district court was filed. Accordingly, plaintiff's motion to vacate the March 24, 1997 Order is denied.

III. CONCLUSION

For the foregoing reasons, we will deny plaintiff's motion to vacate this Court's March 24, 1997 Order dismissing plaintiff's complaint without prejudice. An appropriate Order is filed herewith.

s/ Garrett E. Brown
GARRETT E. BROWN, JR., U.S.D.J.